Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

IMMACULATE CONCEPTION CORP., and
DON BOSCO HIGH SCHOOL,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

JOHN WENDELL HOLMES*
HOLMES & HOLMES
531 Commercial Street
Waterloo, Iowa 50701
(319) 234-7506

Attorney for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

64 pp

QUESTION PRESENTED FOR REVIEW

Whether a commercial speech challenger has to overcome the usual state law presumption that a state statute is presumed to be constitutional?

PARTIES

Petitioner Immaculate Conception Corp. is an Iowa non-profit corporation. Petitioner Don Bosco High School is a parochial high school in Gilbertville, Iowa.

Respondent Iowa Department of Transportation is a department of the government of the State of Iowa charged with enforcing the billboard control provisions of Chapter 306C of the Code of Iowa.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties ii

Table of Authorities iv

Lower Court Decisions 1

Jurisdiction of the Court 2

Constitutional and Statutory Provisions 3

Statement of the Case 13

Reasons for Granting the Petition for Certiorari 16

Conclusion 20

Appendix

Opinion of the Supreme Court of Iowa ..... App. 1

Opinion of the Court of Appeals of Iowa ..... App. 11

Supplement to Order of District Court ..... App. 12

Order of District Court ..... App. 15

Final Ruling of Iowa DOT ..... App. 23

Decision of ALJ ..... App. 24

Excerpt from Letter to Iowa DOT on August 1, 2000 ..... App. 33

Excerpt from Letter to Attorney General on August 18, 2000 ..... App. 34

Excerpt from Letter to Attorney General on September 13, 2000 ..... App. 35

Excerpt from Petitioner's Opening Statement on December 14, 2000 ..... App. 36

TABLE OF AUTHORITIES

Page

CASES

Brazelton Group, L.C. v. Iowa Department of Transportation, 623 N.W.2d 581 (Iowa 2001) 19

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1979) 2, 16, 18, 20

Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998) 18

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 18

City of Waterloo v. Selden, 251 N.W.2d 506 (Iowa 1977) 19

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) 2

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 18

Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1998) 17

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 18

In re Estate of Givens, 254 Iowa 1016, 119 N.W.2d 191 (1963) 19

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 20

United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) 20

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment 1 3

United States Constitution, Amendment 14, section 1 3

23 U.S.C. § 131(c) 3, 13

Iowa Code § 306C.10 ..... 4, 13

Iowa Code § 306C.11 ..... *passim*

LOWER COURT DECISIONS

The administrative law judge entered his decision, following a hearing, on February 5, 2001. He ruled he did not have the statutory authority to strike down a statute as unconstitutional. He did note and preserve Petitioner's constitutional challenges for appeal purposes. (App. 24-31).

The Iowa District Court in and for Black Hawk County entered its order on September 12, 2001; and supplemented it on September 14, 2001. The Court found that section 306C.11 regulated the content of the signs in violation of the 14th amendment and Article 1 section 9 of the Iowa Constitution because the distinction between advertising activities conducted on a property and off that property is arbitrary and bears no rational relationship to highway safety or esthetics. (App. 15-22). In the supplemental order dated September 14, 2001, the Court, noting its finding that the signs were not erected with a purpose of being seen from the adjacent highway, held that whether regulating the content of signs intended to be read from the highway violated freedom of speech or not, regulating the content of the speech in signs not intended to be read from the highway did. (App. 12-14).

The Iowa Court of Appeals affirmed the District Court, without opinion, per curiam, on June 19, 2002. (App. 11).

On review of the Iowa Court of Appeals, the Iowa Supreme Court issued the opinion for which review is sought. The opinion, styled *Immaculate Conception Corp.*

and Don Bosco High School v. Iowa Department of Transportation, No. 174/01-1493, was issued January 23, 2003.

JURISDICTION OF THE COURT

The Iowa Supreme Court held that section 306C.11 does not differentiate between types of advertising devices based on viewpoint. It found that section 306C.11 regulates signs by location, a distinction it found had nothing to do with content. On the question of whether or not section 306C.11 directly advances traffic safety while preserving the landscape, the Court held that it was the burden of the Petitioner to overcome a legal presumption that section 306C.11 is constitutional and that the fact that the record contains no evidence that section 306C.11 directly advances the goals it purports to address was of no concern.

There are no other federal issues to be decided in this case and the Iowa Supreme Court's opinion is a final judgment for purposes of this Petition. *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 478-80 (1975). There is no adequate and independent state ground for the holding in this case. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564, 569 (1979).

No petition for rehearing was filed with the Iowa Supreme Court.

Jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. United State Constitution, Amendment 14, section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. 23 U.S.C. § 131(c)

Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices

shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

IV. Iowa Code § 306C.10. Definitions.

For the purposes of this division, unless the context otherwise requires:

1. "Adjacent area" means an area which is contiguous to and within six hundred sixty feet of the nearest edge of the right of way of any interstate, freeway primary, or primary highway.

2. "Advertising device" includes any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information in the nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway.

3. "Bonus interstate highways" includes all interstate highways except those interstate highways adjacent to areas excepted from control under chapter 306B by authority of section 306B.2, subsection 4.

4. "Commercial or industrial activities" means those activities generally recognized as commercial or industrial by zoning authorities in this state, except that none of the following activities shall be considered commercial or industrial:

a. Outdoor advertising structures.

b. Agricultural, forestry, grazing, farming, and related activities, including, but not limited to, wayside fresh produce.

c. Activities in operation less than three months per year.

d. Activities conducted in a building principally used as a residence.

e. Railroad tracks and minor spurs.

f. Activities outside of adjacent areas, as defined by this division and section 306B.5.

g. Activities which have been used in defining and delineating an unzoned area but which have since been discontinued or abandoned.

h. Residential housing developments.

i. Manufactured home communities or mobile home parks.

j. Institutions of learning.

k. State, county and charitable institutions.

l. State and county conservation and recreation areas, public parks, forests, playgrounds, or other areas of historic interest or areas designated as scheme beautification areas under section 313.67.

5. "Commercial or industrial zone" means those areas zoned commercial or industrial under authority of a law, regulation, or ordinance of this state, its subdivisions, or a municipality.

6. "Department" means the state department of transportation.

7. "Erect" means to construct, reconstruct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish; however, it shall not include any of the foregoing activities when performed incidental to the customary maintenance of an advertising device.

8. "Freeway primary highway" means those primary highways which have been constructed as a fully controlled access facility with no access to the facility except at established interchanges.

9. "Information center" means a site, either with or without structures or buildings, established and maintained at a rest area for the purpose of providing "information of specific interest to the traveling public", as that phrase is defined in section 306C.11, subsection 5.

10. "Interstate highway" includes "interstate road" and "interstate system" and means any highway of the primary system at any time officially designated as a part of the national system of interstate and defense highways by the department and approved by the appropriate authority of the federal government.

11. "Maintain" means to cause to remain in a state of good repair but does not include reconstruction.

12. "Main-traveled way" means the portion of the roadway for movement of vehicles on which through traffic is carried exclusive of shoulders and auxiliary lanes. In the case of a divided highway, the main-traveled way includes each of the separated roadways for traffic in opposite directions, exclusive of frontage roads, turning roadways, or parking areas.

13. "Political sign" means an outdoor sign of a temporary nature, not larger than thirty-two square feet in surface area, erected for the purpose of soliciting votes or support for or in opposition to any candidate or any political party under whose designation any candidate is seeking nomination or election or any public question on the ballot in an election held under the laws of this state.

14. "Primary highways" includes the entire primary system as officially designated, or as

may hereafter be so designated, by the department.

15. "Reconstruction" means any repair to the extent of sixty percent or more of the replacement cost of the structure, excluding buildings.

16. "Rest area" means an area or site established and maintained under authority of section 313.67 within the right of way of an interstate, freeway primary, or primary highway under supervision and control of the department for the safety, recreation, and convenience of the traveling public.

17. "Right of way" means land area dedicated to public use for the highway and its maintenance, and includes land acquired in fee simple or by permanent easement for highway purposes, but does not include temporary easements or rights for supplementary highway appurtenances.

18. "Special event sign" means a temporary advertising device, not larger than thirty-two square feet in area, erected for the purpose of notifying the public of noncommercial community events including but not limited to fairs, centennials, festivals, and celebrations open to the general public and sponsored or approved by a city, county, or school district.

19. "Structure" means any sign supporting device including but not limited to buildings.

20. "Unzoned Commercial or industrial area" means those areas not zoned by state or local law, regulation, or ordinance, which are occupied by one or more commercial or industrial

activities, and the land along the interstate highways and primary highways for a distance of seven hundred fifty feet immediately adjacent to the activities. All measurements shall be from the outer edge of the regularly used buildings, parking lots, storage, or processing areas of the activities and shall be parallel to the edge of pavement of the highway. Measurements shall not be from the property line of the activities unless that property line coincides with the limits of the activities. Unzoned commercial or industrial areas shall not include land on the opposite side of the highway from the commercial or industrial activities.

21. "Visible" means capable of being read or comprehended without visual aid by a person of normal visual acuity.

V. Iowa Code § 306C.11 Advertising Prohibited.

Subject to the provisions made in section 306C.13 regarding control of bonus interstate highways and section 306D.4 regarding scenic highways or byways, an advertising device shall not be erected or maintained within any adjacent area, or on the right-of-way of any primary highway, except the following:

1. Advertising devices concerning the sale or lease of property upon which they are located.

2. Advertising devices concerning activities conducted on the property on which they are located, nor shall the property upon which they are located be construed to mean located upon any contiguous area having inconsistent use, size, shape, or ownership.

3. *a.* Advertising devices within the adjacent area located in commercial or industrial zones or in unzoned commercial or industrial areas in compliance with the regulatory standards of this division and rules promulgated by the department.

b. The rules shall be consistent with national standards promulgated pursuant to 23 U.S.C. § 131 and shall include at least the following:

(1) Provision for a fee schedule to cover the direct and indirect costs related to issuing permits and control of outdoor advertising.

(2) Specific permit requirements.

(3) Criteria for on-premise signs.

(4) Provisions specifying the measurement of required spacing.

(5) Provisions specifying conforming sign configurations.

4. Official and directional signs and notices which shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions, recreational attractions and municipal recognition signs, which shall conform with rules promulgated by the department, provided that such rules shall be consistent with national standards promulgated pursuant to 23 U.S.C. § 131(c).

5. Signs, displays, and devices giving specific information of interest to the traveling public, shall be erected by the department and maintained within the right-of-way in the areas, and at appropriate distances from interchanges

on the interstate system and freeway primary highways as shall conform with the rules adopted by the department. The rules shall be consistent with national standards promulgated from time to time or as permitted by the appropriate authority of the federal government pursuant to 23 U.S.C. § 131(f) except as provided in this section. The rules shall include but are not limited to the following:

a. Criteria for eligibility for signing.

b. Criteria for limiting or excluding businesses that maintain advertising devices that do not conform to the requirements of chapter 306B, this division, or other statutes or administrative rules regulating outdoor advertising.

c. Provisions for a fee schedule to cover the direct and indirect costs of sign erection and maintenance and related administrative costs.

d. Provisions for specifying the maximum distance to eligible businesses.

e. Provisions specifying the maximum number of signs permitted per panel and per interchange.

f. Provisions for determining what businesses are signed when there are more applicants than the maximum number of signs permitted.

g. Provisions for removing signs when businesses cease to meet minimum requirements for participation and related costs.

For purposes of this division, *"specific information of interest to the traveling public"* means only information about public places for camping, lodging, eating, and motor fuel and associated services, including trade names which have

telephone facilities available when the public place is open for business and businesses engaged in selling motor vehicle fuel which have free air for tire inflation and restroom facilities available when the public place is open for business.

Business signs supplied to the department by commercial vendors shall be on panels, with dimensional and material specifications established by the department. A business sign included under the provisions of this section shall not be posted unless it is in compliance with these specifications. The commercial vendor shall pay to the department a fee based upon the schedule adopted under this subsection for each business sign supplied for posting. Upon furnishing the business signs to the department and payment of all fees, the department shall post the business signs on eligible specific information panels. Faded signs shall be replaced and the commercial vendor charged for the cost of replacement based upon the fee schedule adopted. There is created in the office of the treasurer of state a fund to be known as the "*highway beautification fund*" and all funds received for the posting on specific information panels shall be deposited in the "*highway beautification fund*". Information on motor fuel and associated services may include vehicle service and repair where the same is available.

6. The publication title of a newspaper on a delivery receptacle attached to a mailbox or mailbox support.

STATEMENT OF THE CASE

The Iowa Department of Transportation commenced an enforcement action against Petitioners seeking removal of small (4' x 8') plywood signs on the home run fences of the high school's two ball diamonds. To exhaust its administrative remedies, the Petitioners brought a contested case proceeding which was heard by an administrative law judge. (App. 24-32). They raised two issues: (1) whether the signs were visible while driving past the ball fields; and (2) whether section 306C.11 was unconstitutional because the State of Iowa had no evidence that showed that billboards generally or small signs in particular adversely affected traffic safety or esthetics. (App. 25, 30-31). Definitions for use in 306C.11 are found in 306C.10. These, in turn, appear to follow the federal law for effective control found at 23 U.S.C. § 131(c).

The Petitioners raised the federal question prior to the commencement of the contested case proceeding by raising questions three times in three separate letters to Respondent. (App. 33-35). The Petitioners raised the federal question sought to be reviewed in opening statement before the ALJ as well. (App. 36-37).

The administrative law judge found that the signs were visible within the meaning of Chapter 306C. (App. 30). He also ruled that he was without authority to rule on the constitutional challenges, but noted that the federal issues had been raised and preserved for appeal. (App. 31).

The Petitioners appealed to the head of the agency, who affirmed the administrative law judge by adopting the same findings of fact and conclusions of law. (App. 23). That ruling was then the final agency action.

The Petitioners appealed the final agency decision to the Iowa District Court for Black Hawk County, the county where the Petitioners' school is located. The Iowa District Court found that section 306C.11 regulated the content of the Petitioners' outfield signs. The court found on *de novo* review that section 306C.11(2) draws a distinction between signs advertising goods or services offered on the same premises where the signs are located (which are allowed) and so-called "off-premises" signs advertising goods or services available at some other location (which are not allowed). Referring to this distinction, the court said:

> "Because the distinction between advertising activities conducted on a property and off that property is patently arbitrary and bears no rational relationship to highway safety, esthetics, visual clutter and the like, §306C.11 violates the 14th Amendment to the United States Constitution . . . [citations omitted]. (App. 20).
>
> "Secondly, assuming that the same number of signs of the same size could be hung on the outfield fences in the same locations so long as they merely advertised the ball team, concessions, equipment used by the players and so forth, as opposed to activities carried on, or products and services sold off premises, the statute does not regulate the time, place, or manner of advertising at all. In fact, it regulates nothing other than the content of the regulated speech and this violates Petitioners' freedom of speech under the U.S. constitution . . . [citation omitted]." (App. 21).

In a supplement to its ruling, the District Court emphasized that it determined that the signs on the home

run fences were intended to be seen from the bleachers, not from the highway. In the District Court's view, this only made the constitutional violation clearer:

> "Whether §306C.11 draws an arbitrary distinction with no rational basis between the advertising of activities conducted on a property and off a property through signs whose purpose is to be read from the highway or not, it is arbitrary and there is no rational basis to make such distinction between such signs not intended to be read from the highway. (App. 13).
>
> "Whether regulating the content of signs intended to be read from the highway violates freedom of speech or not, regulation of the content of speech in signs not intended to be read from the highway does." (App. 13).

The agency appealed to the Iowa Court of Appeals, which affirmed the District Court without opinion. (App. 11).

The agency sought further review by the Supreme Court of Iowa. (App. 2).

The Supreme Court found that the statute regulated signs based on the location of the sign, not based on the content. "The statute regulates signage by location, a distinction having nothing to do with content." (App. 7).

The Supreme Court also found that the agency did not need to produce any evidence to show that enforcing section 306C.11 against the thirty-seven signs on the two home run fences in this case or against outdoor billboards generally directly advances the states' interests in traffic safety or esthetics. The court said:

> "The high school nevertheless asserts that the record contains no evidence that section 306C.11 directly advances the goals it purports to address, thus failing the third prong of the *Metromedia* test. The fact is, the DOT does not need statistics or reports to enforce the plain mandate of the statute. It is the challenger who bears the burden of overcoming the presumptive constitutionality of a statute by negating every reasonable basis on which the law might be upheld. [citation omitted]. The high school has not met that burden here." (App. 9).

REASON FOR GRANTING THE PETITION FOR CERTIORARI

The reason for granting this Petition is that this case presents a question in rather sharp relief: whether or not the State has the benefit of the usual presumption that a State statute is constitutional when a commercial speech challenge is made based on an alleged failure to meet the third and fourth tests of *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In this case the Respondent offered no evidence to show that section 306C.11 advances the State's interests in traffic safety or esthetics. Prior to the contested case proceeding that initiated this case, Petitioners wrote three letters seeking copies of any studies or data to support the State's position that section 306C.11 somehow affects traffic safety or esthetics. The State had no such evidence; and offered none at trial. If the State had such evidence, it would have been obligated to turn it over during the

pre-trial discovery which is afforded to participants in contested cases in Iowa.

Section 306C.11 regulates content.

On appeal to the District Court, the Court found that the statute governed content. (App. 21). Section 306C.11 draws a distinction between signs that pertain to goods or services offered at some location other than where the sign is found, and signs advertising goods or services at the same location where the sign sits. Since you have to read the sign in the context of where it is found, the content of the sign matters. *Cf. Foti v. City of Menlo Park*, 146 F.3d 629, 634 (9th Cir. 1998).

Since the signs carry the names of boosters who are interested in gaining patronage from the fans in the bleachers, artfully presenting the boosters' business names, addresses, logos and messages are vital to displaying each sign and getting paid for it. Petitioners' booster club retains an artist to carefully paint each sign using any artwork furnished by each advertising business. The signs are hung on the inside of the home run fences, facing home plate. They can be read from the bleachers behind home plate. The agency has sought removal of the signs since they can be seen from the highway which goes past the ball fields' north boundary. In order to decide that these signs were not subject to the 'on-premise' exception to 306C.11, the highway agent had to read the messages on each of the thirty-seven signs.

It is irrelevant that 306C.11 can be said to be viewpoint neutral.

Throughout this case the agency has noted that 306C.11 is viewpoint neutral and merely regulates place in a reasonable manner. The Supreme Court of Iowa adopted that view. (App. 7).

This isn't a so-called "public fora" type of case. *See e.g., Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (external advertising panels on City's buses were neither traditional public fora nor designated public fora); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (light posts and traffic sign posts were not public fora). It is undisputed that these two ball fields are wholly on the Petitioners' property. This is not a case where the government is regulating the use of the government's property.

Nor is it a case where it is suspected that the law in question is designed to control or limit some view point. *Compare, Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (ordinance against outdoor movies with nudity); *with Heffron v. International Society for Krishna Conscience*, 452 U.S. 640 (1981) (limiting religious society to one location or booth at State Fair). Petitioners don't claim the State's purpose is to promote General Motors over Ford, Pepsi Cola over Coke, or Burger King over McDonalds. Since controlling someone's speech about their view isn't involved, it is immaterial that 306C.11 is viewpoint or subject matter neutral.

The question which is relevant under *Central Hudson* is whether or not enforcing 306C.11 directly advances the state's asserted interests.

The burden of persuasion to show compliance with *Central Hudson* should not be placed on the private citizen.

Since the State agency had no evidence in the form of data or reports to support its position, the Supreme Court was left with the general presumption that State statutes are presumed to be constitutional. The Court cited *Brazelton Group L.C. v. Iowa Department of Transportation*, 623 N.W.2d 581, 584 (Iowa 2001) (App. 9).

The rule cited is a state rule of long standing. *See City of Waterloo v. Selden*, 251 N.W.2d 506, 508:

> "The general principles applicable to the determination of the constitutionality of the challenged statutory provision are well established. All presumptions are in favor of the constitutionality of the statute and it will not be held invalid unless it is clear, plain and palpable that such decision is required. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. . . . The burden is not upon defendant Selden [Comptroller of the State of Iowa] . . . to prove the act is constitutional. Plaintiffs have the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provision invoked [14th Amendment equal protection] and to point out with particularity the details of the alleged invalidity. To sustain this burden plaintiffs must negate every reasonable basis which may support the statute."

That the Iowa court looks for something more than a preponderance of the evidence when overcoming a legal presumption is also of long standing. *See In re Estate of Givens*, 254 Iowa 1016, 1023, 119 N.W.2d 191 (1963).

In bringing this case Petitioners relied on the following statement:

> "In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.' [cite omitted.] That burden 'is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' [cite omitted.] We cautioned that this requirement was critical: otherwise 'a State could with ease restrict commercial speech in the service of other objects that could not themselves justify a burden on commercial expression.'"

– *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-487 (1995).

Petitioners' challenge in this case is to 306C.11 as applied to the small little signs on the home run fences. This involves the third and fourth tests of *Central Hudson. United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). There is video tape in evidence, Exhibit 15, that shows that these signs are barely a flash of color in a driver's peripheral vision. It is difficult to see that enforcing 306C.11 in this case directly advances any interest in either safety or esthetics.

CONCLUSION

With deregulation and competition, the number of cable TV channels and FM radio stations is so large that, for practical purposes, "old-fashioned" local advertising

such as local newspapers and outdoor signs are regaining market force once thought to have been lost.

It only makes sense that a state statute such as 306C.11 must be sustained, if at all, on a reasoned, factual basis, and not on the basis of conjecture. The state presumption of constitutionality relied on in the Iowa Supreme Court opinion, now the subject of this Petition, must give way to societies' paramount need for commercial information.

We live in a very competitive world. Commercial information is vital to everyone's well-being. Commercial advertising and the exchange of commercial information are more important today than ever. The Petition for Certiorari should be granted.

Respectfully submitted,

JOHN WENDELL HOLMES*
HOLMES & HOLMES
531 Commercial Street
Waterloo, Iowa 50701

Attorney for Petitioners
**Counsel of Record*

IN THE SUPREME COURT OF IOWA

No. 174/01-1493

Filed January 23, 2003

IMMACULATE CONCEPTION CORP. and DON BOSCO HIGH SCHOOL,

Appellees,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

High school challenges agency order to remove advertising signs from athletic field fence adjoining state highway. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

John W. Holmes of Holmes & Holmes, Waterloo, for appellees.

NEUMAN, Justice.

This appeal concerns Iowa Code section 306C.11 (1999), the statute that regulates outdoor advertising devices along Iowa's primary highways. The Iowa Department of Transportation (DOT) enforced the statute against

Don Bosco High School, requiring it to remove thirty-seven "booster signs" visible to the traveled portion of highway 297. The district court reversed the agency's decision, finding that either an on-premise exception applied or the statute is unconstitutional. On the DOT's appeal of the ruling, the court of appeals affirmed without opinion. *See* Iowa R. App. P. 6.24.

We granted the DOT's petition for further review. For the reasons that follow, we vacate the court of appeals' decision, reverse the district court and remand for an order upholding the agency's order to remove the signs.

I. Background.

The facts are undisputed. Don Bosco High School's baseball and softball diamonds are located within the city limits of Gilbertville, Iowa. Along the outfield fences of the ball diamonds, facing home plate, hang thirty-seven signs purchased by "boosters" whose local businesses support the high school's athletic activities. The plywood placards are four-by-eight feet in size. Each displays the name of the booster. Most contain additional information such as the booster's address, phone number, slogan (e.g., "No Job Too Small") or logo.

Because these booster signs are within 660 feet of adjoining state highway 297, and visible from the traveled portion of the roadway, the DOT believed they violated pertinent portions of Iowa Code section 306C.11. The statute prohibits advertising devices "erected or maintained within any adjacent area, or on the right-of-way of any primary highway" except signs "concerning activities conducted on the property on which they are located." Iowa Code § 306C.11. By statute, "adjacent area" means

"an area which is contiguous to and within six hundred sixty feet of the nearest edge of the right of way of any interstate, freeway primary, or primary highway." *Id.* § 306C.10(1). The term "[a]dvertising device" is broadly defined to include

> any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information in the nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway.

Id. § 306C.10(2).

The DOT sent out removal notices. Contested administrative proceedings followed in which the high school challenged the DOT's claim that the signs were visible from the highway. The school also claimed that enforcement of the statute was an assault on constitutionally protected commercial speech, an issue the administrative law judge (ALJ) did not resolve but preserved for judicial review.

An administrator for the DOT's highway beautification program testified that he had personally observed the signs and that they were adjacent to highway 297 and visible to drivers along the roadway. In revealing testimony, one of the boosters not only admitted the signs could be read from the highway but, in the DOT's words, "also helped explain why state law prohibits them":

> Q. If you are driving out of town and you take your eyes off the road and look over at the left and you try to pick out a sign, just one sign all by

> itself and read just one sign, can you read it? A. Maybe.
>
> Q. What's it depend on? A. The weather, for one thing.
>
> Q. Assume it is clear weather. A. How fast you were going and if you want to have an accident or not by looking at the signs instead of at the road.

Based on this evidence, the ALJ affirmed the order for removal of the signs. Following an unsuccessful intra-agency appeal, the high school sought judicial review. The district court acknowledged that substantial evidence supported the agency's finding that the signs are visible from the road, in evident violation of section 306C.11. It went on, however, to hold that the signs fell within the "on-premise" exception to the statute. Alternatively the court found the statute was not only an unconstitutional regulation of speech but violated due process and amounted to a taking of property without just compensation. This appeal by the DOT followed.

II. Scope of Review.

Our review is for the correction of errors at law. *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). To the extent the appeal concerns issues of constitutional magnitude, we review the record de novo. *Id.*

III. Applicability of On-Premise Exception.

The district court evidently believed that the booster signs were not intended to advertise the boosters' businesses

but to celebrate the "boosterism" occurring within the ballfields themselves. In the court's words, "this act of recognizing supporters and being recognized as a supporter of the athletic teams is an activity conducted on the property just as selling concessions, having a celebrity throw out the first pitch on opening day and the like." Following this reasoning, the court concluded the on-premise exception to section 306C.11 applied. The DOT assails this conclusion on appeal. Bypassing its credible objection to the way the issue was preserved for review, we agree that the defense fails on its merits.

Under the on-premise exception, "[a]dvertising devices concerning activities conducted on the property on which they are located" are not prohibited. Iowa Code § 306C.11(2). To qualify for the exception, an on-premise sign "must be located on the same property as the advertised activity" and limited to "identifying the activities located on or products or services available on the property." Iowa Admin. Code r. 761-117.1 (1999). Thus, for example, the exception would permit a fast-food establishment like McDonald's to erect signage on its own property notwithstanding its proximity to the highway. *Cf. Brazelton Group v. Iowa Dep't of Transp.*, 623 N.W.2d 581, 583 (Iowa 2001) (under similar language in predecessor statute, court affirmed order preventing company from locating sign for Ramada motel on property owned by Sirloin Stockade restaurant).

Here, the district court attempted to shoehorn something into the exception that simply does not fit. The placards in question do not merely identify or celebrate boosters in the bleachers. They advertise goods and services available to the public well beyond the centerfield fence. If their sole purpose were to foster goodwill, there

would be no need to include addresses and telephone numbers on the signs. Moreover, as the DOT rightly points out, the goodwill generated by the signs "is the very essence of advertising." Because the signs do not advertise products or services available on the property, they do not qualify for protection under the plain meaning of section 306C.11(2). The district court erred in so ruling.

IV. Constitutionality of Iowa Code section 306C.11.

The district court ruled that if the booster signs do not fit the on-premise exception, then the statutory prohibition against their display deprives the high school of due process, takes its property without just compensation and violates its right to freedom of speech. On appeal, the DOT begins by noting that the high school limited its constitutional claims to alleged First Amendment breaches, that is, claims that the statute violates "protected commercial speech" and "liberty of speech." It asserts the other constitutional bases for the court's decision have not been preserved for our review. We agree. *See Garwick v. Iowa Dep't of Transp.*, 611 N.W.2d 286, 288 (Iowa 2000) (failure to raise constitutional issue before agency prevents preservation of claim for judicial review and on appeal).

Two free-speech claims are before us. First, the DOT challenges the district court's finding that the distinction drawn in section 306C.11 between on-premise and off-premise signs amounts to an unconstitutional content-based regulation of commercial speech. Second, the DOT contests the court's conclusion that section 306C.11, as applied to these signs, unconstitutionally restricts speech

without advancing the state's interest in traffic safety or aesthetics.

Fundamental principles guide our resolution of these issues. Content-based speech regulations are forbidden by the Constitution. *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S. Ct. 2118, 2128, 80 L. Ed. 2d 772, 786 (1984). But, as the DOT rightly argues, the district court has misinterpreted the meaning of "content-based" as applied to the facts of this case. Content-based statutes "favor some *viewpoints or ideas* at the expense of others." *Id.* at 804, 104 S. Ct. at 2128, 80 L. Ed. 2d at 786 (emphasis added). Section 306C.11 does not differentiate between types of advertising devices based on viewpoint. The statute regulates signage by location, a distinction having nothing to do with content. The United States Supreme Court has recognized this distinction, clearly holding that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 512, 101 S. Ct. 2882, 2895, 69 L. Ed. 2d 800, 818 (1981). Other courts have routinely rejected the argument put forth by the high school here. *See, e.g., Messer v. City of Douglasville,* 975 F.2d 1505, 1509 (11th Cir. 1992) (city ordinance prohibiting off-premise billboards is viewpoint neutral); *Nat'l Adver. Co. v. Chicago,* 788 F. Supp. 994, 997-98 (N.D. Ill. 1991) (distinction between on-site and off-site advertising "not aimed toward the suppression of an idea or a viewpoint"). The district court erred when it interpreted section 306C.11 to the contrary.

As for the claim that section 306C.11 otherwise unconstitutionally restricts the high school's freedom of speech, we are guided by the four-part test articulated by the Supreme Court in *Metromedia*:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815.

We observe at the outset that the speech being regulated here is of a commercial nature and thus afforded lesser constitutional protection than other forms of expression. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557, 563, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341, 349 (1980). Because the booster signs neither advertise illegal activity nor are they misleading, however, the state's power to restrict them is circumscribed. *Id.* at 563-64, 100 S. Ct. at 2350, 65 L. Ed. 2d at 349. Thus we move to the second part of the *Metromedia* test.

The DOT asserts that section 306C.11 advances the state's interests in traffic safety and aesthetics. The Supreme Court has held these are "substantial governmental goals." *Metromedia,* 453 U.S. at 507-08, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815; *accord Messer,* 975 F.2d at 1510-11. This court has long recognized our legislature's intent to echo Congress's national highway beautification and safety goals by regulating signage along Iowa's primary roadways. *Iowa Dep't of Transp. v. Nebraska-Iowa Supply Co.,* 272 N.W.2d 6, 13 (Iowa 1978), *overruled on other grounds by Estate of Grossman v. McCreary,* 373 N.W.2d 113, 114 (1985); *accord Meredith Outdoor Adver.,*

Inc. v. Iowa Dep't of Transp., 648 N.W.2d 109, 115 (Iowa 2002). In short, there can be little doubt that section 306C.11 addresses a substantial governmental interest in protecting the traveling public while preserving the landscape adjoining Iowa's highways.

The high school nevertheless asserts that the record contains no evidence that section 306C.11 directly advances the goals it purports to address, thus failing the third prong of the *Metromedia* test. The fact is, the DOT does not need statistics or reports to enforce the plain mandate of the statute. It is the challenger who bears the burden of overcoming the presumptive constitutionality of a statute by negating every reasonable basis on which the law might be upheld. *Brazelton,* 623 N.W.2d at 584. The high school has not met that burden here.

Finally, the Constitution requires that the challenged statute be no "more extensive than is necessary" to meet the state's articulated interests. *Central Hudson,* 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351. In that connection we note that section 306C.11 is less prohibitive than the ordinance at issue in *Metromedia.* There the Supreme Court upheld a statute prohibiting *all* outdoor off-premise advertising. *Metromedia,* 453 U.S. at 493-96, 101 S. Ct. at 2885-87, 69 L. Ed. 2d at 805-08. Iowa Code section 306C.11 only prohibits advertising devices within 660 feet of the right-of-way. As the DOT suggested in its early correspondence with school officials over this controversy, they need only mount the signs so that they are not visible from the traveled portion of highway 297. And, of course, the statute does not affect the myriad other ways the school may lawfully recognize its boosters.

In summary, Iowa Code section 306C.11 draws a legitimate distinction between on-premise and off-premise signs and regulates the signage at issue here consistent with constitutional norms pertaining to commercial speech. The district court's contrary judgment must be reversed and the court of appeals decision affirming that ruling, vacated. We remand to the district court for entry of an order affirming the DOT's removal notice.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS.

IN THE COURT OF APPEALS OF IOWA

No. 2-394/01-1493
Filed June 19, 2002

IMMACULATE CONCEPTION CORP. and DON BOSCO HIGH SCHOOL,
Petitioners-Appellees,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

The respondent appeals from the district court ruling on judicial review reversing the respondent's order requiring the petitioners to remove signs that the respondent found under Iowa Code section 306C.11 (1999) to be prohibited advertising signs within the adjacent area of a highway. **AFFIRMED**.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

John W. Holmes of Holmes & Homes, Waterloo, for appellees.

Considered by Sackett, C.J., and Huitink and Hecht, JJ.

PER CURIAM

AFFIRMED. *See* Iowa R. App. P. 6.24.

IN THE IOWA DISTRICT COURT FOR
BLACK HAWK COUNTY

IMMACULATE CONCEPTION CORP., and DON BOSCO HIGH SCHOOL, Petitioner, vs. IOWA DEPARTMENT OF TRANSPORTATION, Respondent.	NO. LACV0855949 SUPPLEMENT TO ORDER DATED SEPTEMBER 12, 2001

Because things that should go without saying should never go without saying, and because meaning depends on context, this is a supplement to the Court's order of September 12, 2001, to state directly, rather than by direct implication, that its findings and conclusions with respect to the constitutionality of § 306C.11 (Code of Iowa), only apply to signs which have not been erected with the purpose of their message being read from the main traveled way.

As stated in the original order, such signs would not be regulated or prohibited under federal law and Court expresses no opinion one way or another whether the statute would be constitutional if limited to signs erected with the purpose of being read from the highway.

Whether § 306C.11 draws an arbitrary distinction with no rational basis between the advertising of activities conducted on a property and off a property through signs whose purpose is to be read from the highway or not, it is arbitrary and there is no rational basis to make such

distinction is between such signs not intended to be read from the highway.

Whether regulating the content of signs intended to be read from the highway violates freedom of speech or not, regulation of the content of speech in signs not intended to be read from the highway does.

Finally, whether taking the right of property owners to sell or lease space for signs advertising activities not conducted on the property for a public purpose when those signs are intended to be read from the highway requires just compensation or not, taking those rights for a public purpose when the signs are not intended to be read from the highway does.

While the Court can only speculate that it may have been out of constitutional considerations that the federal government limited billboard regulation to signs which were erected with the purpose of their message being read from the highway, there is little doubt that the limitation recognizes the practical necessity of enabling travelers to reach their destination by permitting owners or tenants of property to identify themselves and their activities.

In any event, whether the State can prohibit signs intended to be read from the highway which advertise activities not conducted on the property was not an issue presented to or decided by the Court and this amendment is incorporated in the original order the same as if originally included.

September 14, 2001.

/s/ Jon Fister
JON FISTER, JUDGE
FIRST JUDICIAL DISTRICT

cc: counsel

IN THE IOWA DISTRICT COURT FOR
BLACK HAWK COUNTY

IMMACULATE CONCEPTION CORP., and DON BOSCO HIGH SCHOOL,	)	NO. LACV085949
Petitioner,	)	ORDER
vs.	)	(Filed Sept. 12, 2001)
IOWA DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

Petitioners' appeal was submitted to the Court on briefs and oral argument on September 10, 2001. The parties appeared by their attorneys who participated by telephone conference call.

This is an appeal of a ruling by the Iowa Department of Transportation affirming an administrative law judge's proposed decision that some 37 signs erected by Petitioners are in violation of §306C.11 (Code of Iowa). In making this ruling, the Court has reviewed the entire record made before the administrative law judge, including the administrative file, the exhibits offered and admitted into evidence, the ALJ's proposed decision and the ruling on appeal to the review officer.

Based on this review, the Court agrees with Petitioners that enforcing Iowa's billboard control laws against Don Bosco High School and its Booster Club ends up hurting the student athletes who are assisted by the Booster Club's fund raising and ends up negatively interfering with the school-pride and competitiveness vital to the program but also to the community of Don Bosco High

School at large. The Court is also inclined to the view that, if enforcement of this statute against the school were the result, of agency policy rather than legislative policy, in other words, if enforcement were not required by law, the ALJ's decision would likely be reversed because the negative impact on the private rights affected is so grossly disproportionate to the benefit accruing to the public interest that it does not appear to have any rational foundation. See §17A.19(10)(k) (Code of Iowa). Stated otherwise, the Court cannot reverse the agency when it is the legislature, rather than the agency, which imposes a grossly disproportionate impact on private rights by enacting legislation having no rational foundation.

The Court, concludes, however, that Petitioners' signs are not in violation of the statute or, if they are in violation, the statute is unconstitutional both on its face and as applied to Petitioners for the following reasons.

There are 37 4 by 8 plywood signs involved in this case. The signs have been attached to the inside of the outfield fences at Don Bosco's High School baseball and softball diamonds in Gilbertville, Iowa. Each sign contains the name and sometimes the phone number of a local sponsoring business who makes an annual donation to the Booster Club. The Booster Club spends the donations on uniforms and equipment for the school's athletic teams. Neither Petitioners nor the Booster Club rents or sells advertising space on the outfield fences to the sponsors, and the Booster Club is incapable of doing so because it does not own that space. Parenthetically, it would be incorrect but not surprising if both the contributors to the athletic program and the Boosters Club would tend to characterize donations to the athletic program as the purchase or rental of advertising space if for no other

reason than because the Booster Club, more likely than not, is not an organization to which tax deductible contributions can be made while advertising is a tax deductible business expense. Moreover, although the record is silent on the issue, the Court assumes without deciding that an individual or group with no particular outside activities, such as an alumni society, could and would also be recognized by a sign on the fence if he, she, or they made a similar contribution to the Booster Club.

In any event, how Petitioners, the Booster Club, and its contributors characterize these donations is not dispositive of any of the issues in this case and it is clear that Don Bosco High School has no interest in advertising activities off its premises and merely permits the Boosters to hang the signs on the fence to recognize the supporters of the school's baseball and softball programs and this act of recognizing supporters and being recognized as a supporter of the athletic teams is an activity conducted on the property just as selling concessions, having a celebrity throw out the first pitch on opening day and the like. Advertising devices concerning activities conducted on the property on which they are located are not prohibited. See §§306C.11(2) (Code of Iowa).

Recognizing financial supporters by identifying them by name and including a telephone number which parents and other interested parties can call to express their gratitude could be done in many ways. It could be done in a newsletter, it could be done in a program of events, if [sic] could be done on a plaque in a trophy case or affixed to the bleachers, or it could be done by an announcement over a loudspeaker system during the 7th inning stretch. Nonetheless, so long as the activity of recognizing financial supporters and being recognized as a financial supporter is

an activity conducted at the athletic fields, signs or displays in furtherance of that activity are not prohibited. Moreover, were this a federal highway, the signs would not be in violation of federal law because it is apparent from their size and location that the signs were not "erected with the purpose of their message being read from (the) main traveled way." See 23 U.S.C. §131 (c). The evidence in support of these findings appears in the record made before the administrative law judge at pages 45 and 46 and 65-66, in Petitioners' videotape, and in Respondent's photographs.

As an aside, because Iowa law is more restrictive than federal law concerning whether signs have been erected with the purpose of being read from the highway, that difference together with this ruling should clearly insulate the state from any risk of losing federal highway funds.

In the Court's view, using signs to identify and recognize supporters at the ball fields is indistinguishable from using signs to inform fans and spectators that Coke and Pepsi are available at the concession stands, that the student athletes hit their homeruns (but do not hit them off premises) with Louisville Sluggers; that they field fly balls, line drives, and ground balls with Rawlings baseball gloves; or that they round the bases in Reeboks. All of these are activities conducted on the premises and all of them appear to be legitimate subjects of signage at the ball fields.

This particular issue was directly addressed by Petitioners in their reply brief at the bottom of page 6 and the top of page 7. Although it was not directly raised in Petitioners' post trial brief to the reviewing officer, or in their petition for Judicial review, the Court finds that it

was raised indirectly in their initial brief in this appeal in the references to boosterism and in the conclusion. The ALJ, however, did find that it was the Booster Club which solicited these contributions and that in return the local businesses would be recognized by having their names put on the signs which were attached to the home run fence.

Because the Court believes that insufficient attention was paid to the distinction between the on-premises activity of recognizing financial supporters of the the [sic] school's athletic programs through donations to the Booster Club and whatever off premises activities the sponsors may conduct, and because this clearly distinguishes this case from the ordinary sale or lease of commercial advertising space for off-premises activities, the Court believes that the parties should deem the issue submitted by consent or, by post hearing motion, should request a limited remand to the agency and the ALJ for further findings and rulings on this issue including, if appropriate, the taking of additional evidence.

Having said that much, the Court also finds that if these signs were not within the exception for the advertising of activities conducted on the property, as provided by §306C.11(3) (Code of Iowa) they would be prohibited if §306C.11 is constitutional. The signs are within 650 feet of Highway 297. Highway 297 is a primary highway as designated by the department, viz., the state department of transportation, and, although in serious dispute, there is substantial evidence in support of the ALJ's finding that the signs are visible when the whole record is taken into account, including all of the evidence in support of and contrary to a finding of visibility. See §§306C.10(1), (2), (6), (14), (21), and §§17A.19(10)(f)(1),(2), and (3) (Code of Iowa).

With respect, however, to the constitutional issues, the Court is unable to find that there is any constitutional basis for distinguishing between the advertising of activities conducted on and off the property for the following reasons.

Assuming that the regulation of billboards pursuant to Division II of Chapter 306C of the Iowa Code is an exercise of the police power of the State, the Court can conceive of no rational basis to distinguish between advertising activities conducted on and off the property with respect to the impact they have on highway safety, esthetics, visual clutter, and the like. On this record, it appears that Don Bosco High School could erect and maintain 37 4 by 8 plywood signs on their fences to advertise and promote their softball and baseball teams (but not their fencing or jai alai teams), the sale of concessions, the equipment used by the players, and so forth without violating any billboard regulations. The signs could be identical or they could be distinguishable by background color; size, color, and style of lettering; pictures of team members; and so forth. They do not exceed any applicable size restriction and there is no restriction as to number or placement. Because the distinction between advertising activities conducted on a property and off that property is patently arbitrary and bears no rational relationship to highway safety, esthetics, visual clutter, and the like, §306C.11 (Code of Iowa) violates the 14th amendment to the United States Constitution and §9 of Article 1 of the Iowa Constitution. See *Koster v City of Davenport, Iowa*, 183 F.3d 762 (C.A. 8 Iowa 1999); *Hill v Hamilton County Public Hosp.*, 71 F. Supp. 2d 936 (N.D. Iowa 1999); *State v Bell*, 572 N.W.2d 910 (Iowa 1997).

Secondly, assuming that the same number of signs of the same size could be hung on the outfield fences in the same locations so long as they merely advertised the ball team, concessions, equipment used by the players and so forth, as opposed to activities carried on, or products and services sold off premises, the statute does not regulate the time, place, or manner of advertising at all. In fact, it regulates nothing other than the content of the regulated speech and this violates Petitioners' freedom of speech under the U.S. and Iowa Constitutions. See *Messer v City of Douglasville, Georgia*, 975 F.1d [sic] 505, 1510 (11th Cir. 1992).

Finally, because the distinction between the advertising of activities on and off premises bears no rational relationship to highway safety, esthetics, visual clutter, and the like, prohibiting Petitioners from leasing or selling advertising space which they can use to advertise their own activities is a taking for public purposes which deprives Petitioners of a valuable property right without just compensation, and this violates the 5th amendment to the United States Constitution and §18 of Article 1 of the Iowa Constitution. See *Crippen v City of Cedar Rapids*, 618 N.W.2d 562 (Iowa 2000); *Kelley v Story County Sheriff*, 611 N.W.2d 475 (Iowa 2000); *Osborn v City of Cedar Rapids*, 324 N.W.2d 471 (Iowa 1982); *Sioux City v Tott*, 60 N.W.2d 510 (Iowa 1953); and *Lage v Pottawattamie County*, 5 N.W.2d 161 (Iowa 1942).

In reaching these conclusions, the Court is we'll aware of and has considered the authorities, which are extensive, to the effect that the constitutionality of statutes is presumed, that every possible constitutional construction of a statute must be negated, and all of the other principles

which generally promote deference to the legislature's prerogatives.

For all of these reasons, the Court concludes that Don Bosco High School should not be prohibited from recognizing its sponsors and showing its appreciation for their financial support by identifying them on signs posted on the outfield fences of their baseball and softball fields.

IT IS THEREFORE ORDERED:

1. The decision of the agency is reversed.

2. The Court will consider submissions by the parties in support of or in opposition to a remand to the administrative law judge for additional findings and conclusions regarding the Court's determination that Petitioner's signs concern activities conducted on the property on which they are located are exempt from prohibition pursuant to §306C.11 (Code of Iowa) because they concern activities conducted on the property on which they are located, if filed within the time for filing a motion pursuant to R.C.P. 179b.

3. Costs are taxed to Respondent in the amount of $___.

September 12, 2001.

/s/ Jon Fister
JON FISTER, JUDGE
FIRST JUDICIAL DISTRICT

cc: counsel

Final Ruling of DOT Affirming ALJ's Proposed Decision Dated April 5, 2001

STATEMENT OF CASE

The appellant filed an appeal of the administrative law judge's proposed decision entered on February 5, 2001. The proposed decision upheld the respondent's determination that the appellant's sign is in violation of Iowa Code section 306C.11.

FINDINGS OF FACT

The ALJ's findings of facts are adopted and set out in this ruling as if fully set out.

CONCLUSIONS OF LAW

The ALJ's conclusions of law are found correct and are adopted in full in this ruling.

ORDER

The decision of the administrative law judge is supported by the record and is affirmed.

DATED THIS 5th DAY OF April, 2001.

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
LUCAS STATE OFFICE BUILDING
DES MOINES, IOWA 50319

IMMACULATE CONCEPTION CORP. AND DON BOSCO HIGH SCHOOL,

Appellants

v.

IOWA DEPARTMENT OF TRANSPORTATION OFFICE OF RIGHT OF WAY,

Respondent

DOCKET NO. OODOTRW-2

DECISION

STATEMENT OF THE CASE

This matter came on for hearing before Administrative Law Judge John M. Priester pursuant to an appeal by the Appellants from a decision of the Department of Transportation's notice to the Appellant that the signs erected on the high school's baseball and softball home run fences were inappropriate. The hearing was held on December 14, 2000. The Appellants participated in the hearing with Leo Becker, a booster member from Don Bosco High School, and Attorney John W. Holmes. The Respondent was represented by Assistant Attorney General Mark Hunacek and called as a witness Steven Westvold of the Iowa Department of Transportation Office of Right of Way.

The record was held open for the submission of post-hearing briefs. The record was closed on January 29, 2001, after all of the briefs were received.

The following exhibits were admitted into the record without objection:

Exhibits 1-4: Photographs taken in Gilbertville, Iowa;
Exhibits 5-9: Photographs taken in Lamont, Iowa;
Exhibits 10, 11, 12 & 14: Photographs taken in Elkader, Iowa;
Exhibit 13: Map drawn of the area;
Exhibit 15: Videotape.

ISSUE

The Appellants raised two issues on appeal: whether the signs in question are visible from Highway 297 and whether the Iowa regulations and laws are unconstitutional.

BURDEN OF PROOF

The Appellants are challenging the Respondent's action in serving notice that the signs erected are in violation of Iowa law. In an administrative action, where the Appellant is challenging an agency determination, the burden of proof is upon the Appellant to show the agency's actions were unreasonable, arbitrary or capricious or characterized by an abuse of discretion. *Empire Cable v. Dept. Of Revenue & Finance*, 507 N.W.2d 705, 707 (Iowa App. 1993); *Busing v. Iowa Dept. Of Transp, MVD*, 455 N.W.2d 921, 922 (Iowa 1990).

The Iowa Supreme Court has held that a court reviewing the decision of an administrative agency may reverse, modify, or grant other appropriate relief only if the agency action is affected by error of law, is unsupported by substantial evidence in the record, or is characterized by an abuse of discretion. *Burns v. Board of Nursing*, 495 N.W.2d 698 (Iowa 1993).

FINDINGS OF FACT

The facts in this matter are generally not in dispute. The Appellants have a baseball and softball diamond in Gilbertville, Iowa. As a fundraiser for the booster club local businesses are solicited to have their names put on four feet by eight foot signs that are attached to the home run fence. The money raised by this endeavor goes towards paying for team uniforms and the like. There are 37 signs located on these two ball diamonds.

The signs can be seen from the highway. The signs are only four feet by eight feet and have some larger print and some smaller print. But they can be seen and read from the highway.

The Appellants presented evidence in the form of a videotape showing that when you drive by the ball fields at the posted speed limit of 35 miles per hour, the signs are not visible.

The ball fields are located just south of Highway 297. Highway 297 is designated a primary state highway. The signs are located within the adjacent area of the highway. The adjacent area is the area within 660 feet of the highway right-of-way measured on a line perpendicular to the centerline of the highway.

The Respondent sent notice on January 31, 2000, that the sign violated Iowa Code Chapter 306C and must be removed. The Appellant appealed this notice.

CONCLUSIONS OF LAW

The Federal Government passed legislation, the Bonus Act, to encourage the states to regulate outdoor advertising. See

23 U.S. § 131, 23 C.F.R. § 750.713. The federal legislation states:

> It is a national policy that the erection and maintenance of outdoor advertising signs, displays, or devices within 660 feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System constructed upon any part of the right-of-way, the entire width of which is acquired subsequently to July 1, 1956, should be regulated, consistent with national standards to be prepared and promulgated by the Secretary of Transportation.

23 C.F.R. § 750.101(a)(2).

The federal regulations also state:

> The provisions of this subpart are applicable to all areas adjacent to the Federal-aid Interstate and Primary Systems, including toll sections thereof, except that within urban areas, these provisions apply only within 660 feet of the nearest edge of the right-of-way. These provisions apply regardless of whether Federal funds participated in the costs of such highways. The provisions of this subpart do not apply to the Federal-aid Secondary or Urban Highway System

23 C.F.R. § 750.702

The Iowa legislature passed laws in conformance with the Bonus Act. The Iowa Code provides that "an advertising device shall not be erected or maintained within any adjacent area, or on the right-of-way of any primary highway." Iowa Code § 306C.11. This code section then lists the exceptions to this rule. The exceptions include signs such as:

1) advertising the sale or lease of property upon which they are located;

2) advertising activities conducted on the property on which they are located;

3) in the adjacent area in commercial/industrial zones;

4) official and directional signs pertaining to items such as natural wonders, scenic and historic attractions, recreational attractions and municipal recognition signs;

5) erected by the Department of Transportation giving information of interest to the traveling public;

Iowa Code § 306C.11(1)-(5).

The Iowa Code defines "adjacent area" as "an area which is contiguous to and within six hundred sixty feet of the nearest edge of the right of way of any interstate, freeway primary, or primary highway." 306C.10(1). An "advertising device" is defined as "any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information on in the nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway." Iowa Code § 306C.10(2). A "primary highway" is "the entire primary system as officially designated, or as may hereafter be so designated, by the department." Iowa Code § 306C.10(14) . Finally, "visible" is defined as "capable of being read or comprehended without visual aid or by a person of normal visual acuity." Iowa Code § 306C.10(21).

The Appellants' challenge to the agency action is that the Respondent's action is improper because the signs are not visible from Highway 297. The Appellant contends that the signs are not visible from the road when a vehicle is traveling at the posted speed limit, when the driver's eyes are fixed on the road and the perpendicular and parallel signs are not visible when traveling at the posted speed limit.

It is undisputed that the signs erected on the two ball fields are within the adjacent area along Highway 297 in Gilbertville, Iowa. It is also undisputed that the signs constitute an "advertising device" under Iowa Code section 306C.10. The only question to be determined is whether the signs are "visible" from the traveled portion of Highway 297.

The Appellants' position is that these signs are not capable of being read or comprehended when passing by the ball fields at the posted speed limit. Additionally, many of the signs are placed parallel and perpendicular to the highway so it is very difficult for a passing motorist to see the signs and understand that they are advertisements. The Appellants urge that the signs were placed on the home run fences solely for the viewing of the spectators at the ball games and not as advertisements to be read by passing motorists.

Iowa law, as stated previously, defines visible as "capable of being read or comprehended without visual aid or by a person of normal visual acuity." Iowa Code § 306C.10(21). Comprehend is defined in the dictionary as "to grasp mentally; understand or know." *The American Heritage Dictionary*, Second Edition, Houghton, Mifflin Company, Boston, 1985.

The question boils down to whether visible requires that the entire sign be able to be read and understood from the traveled portion of the road, or whether the sign just has to be comprehended, or understood, to be an advertisement.

The undersigned finds that the signs attached to the home run fences at the baseball and softball diamonds at the Don Bosco High School are able to be read or comprehended from the traveled portion of the highway. When viewing the signs from the highway a viewer is able to comprehend that the signs are advertising for local businesses. Not all of the words may be clearly read, but the viewer comprehends, or understands, that the signs are advertisements. Thus, the signs fall within the regulations of the Respondent Agency. The Appellants have failed to satisfy their burden of proof that the Agency's actions were unreasonable, arbitrary or capricious or characterized by an abuse of discretion.

The Appellants' argument that the question of whether the signs are visible or not should be determined by a vehicle traveling past the signs at the posted speed limit is rejected as unreasonable. Iowa law allows the Department of Transportation to regulate signs if they are visible "from the traveled portion of any interstate or primary highway." Iowa Code § 306C.10(2). There is nothing in this code section that would require that the sign be visible from the traveled portion of the highway while passing the sign at the posted speed limit. All that is required is that the signs be capable of being seen or comprehended from the roadway. These signs fall into that classification.

The Appellants' next issue raised was a constitutional challenge to the Respondent's action. The Appellants urge

that the Constitution was violated in that there was no proof that Iowa Code section 306C.11 advances the State's interest in traffic safety and esthetics, unequal protection in that political and special events signs are permissible but off-premises commercial signs are disallowed, and because section 306C.11 is more extensive than necessary to serve the asserted state interests of traffic safety and esthetics.

The undersigned does not have the authority to strike down a statute as unconstitutional. See, *Salsbury Laboratories v. Iowa Department of Environmental Quality*, 276 N.W.2d 830 (Iowa 1979). However, an administrative law judge may receive evidence on constitutional issues to preserve an appellant's record for judicial review. See *Chauffeurs, Teamsters and Helpers Local No. 238 v. Iowa Civil Rights Commission*, 394 N.W.2d 375 (Iowa 1986). Thus, the Appellant's constitutional challenges are noted and preserved for appeal purposes, but they will not be ruled upon.

DECISION

The Respondent's determination that the Appellant's sign is in violation of Iowa Code chapter 306C.11 is correct and hereby AFFIRMED.

DATED THIS 5th DAY OF FEBRUARY, 2001.

/s/ John M. Priester
JOHN M. PRIESTER
Administrative Law Judge

CC: JOHN W HOLMES, ATTORNEY
HOLMES & HOLMES
631 COMMERCIAL STREET SUITE 612
WATERLOO IA 50701

MARK HUNACEK, DOT GENERAL COUNSEL

STEVEN WESTVOLD
DOT RIGHT OF WAY OFFICE

TERRI EMERY, DIA

BETTY MAXWELL, DIA

This decision shall be final, unless within twenty (20) days from the date of this Order, you or any interested party appeal to the Director of the Right of Way Office, Iowa Department of Transportation, Park Fair Mall, 100 Euclid Avenue, P.O. Box 9204, Des Moines, Iowa 50306-9204, clearly stating the grounds upon which such appeal is based. See Iowa Administrative Code 761-13.7.

Holmes & Holmes
Lawyers
531 Commercial Street – Suite 612
Waterloo, Iowa 50701

August 1, 2000

Linda Ferguson
Advertising Control Section
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

RE: Immaculate Conception Corp. and Don Bosco High School, Gilbertville, Iowa
Request to Remove or Bring Outdoor Advertising Signs into Compliance

Dear Ms. Ferguson:

* * *

We respectfully take issue with your determination that the messages in question are commercial messages subject to control under Chapter 306C. We also respectfully suggest, in the event these boosters' names are somehow found to be "signs" within the meaning of Chapter 306C, that they do not affect traffic safety nor aesthetics from the roadway. Finally, even if they are commercial, they are protected speech within the meaning of *Central Hudson Gas & Electric*, 447 U.S. 557 and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490.

Please send me whatever you rely on in your determination that because these signs are visible from Highway 297, they affect traffic safety or aesthetics in any way.

* * *

Holmes & Holmes
Lawyers
531 Commercial Street – Suite 612
Waterloo, Iowa 50701

August 18, 2000

Mark Hunacek
Assistant Attorney General
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Dear Mark:

* * *

I would also like to know who made the decision to issue the certified letter? What did that person base their decision upon? Who reviewed their decision before the letter went out? What was the review based upon?

Does the DOT have any studies showing the effects of outdoor signs on traffic safety?

Does the DOT have any studies concerning the aesthetics of signage in a ballpark?

Has the DOT taken steps against the outfield signs in any other ballpark?

* * *

Holmes & Holmes
Lawyers
531 Commercial Street – Suite 612
Waterloo, Iowa 50701

September 13, 2000

Mark Hunacek
Assistant Attorney General
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

RE: Don Bosco High School and Immaculate Conception Corp.

Dear Mark:

* * *

We also specifically request that discovery be completed before a hearing date is set. In that regard, I would like copies of whatever the DOT is relying on to support their determination that the signs in question affect traffic safety or aesthetics in any way.

* * *

IOWA DEPARTMENT OF
INSPECTIONS AND APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS

IMMACULATE CONCEPTION CORPORATION & DON BOSCO HIGH SCHOOL,	:	
Appellant,	:	
vs.	:	DOCKET NO. 00DOTRW-2
IOWA DEPARTMENT OF TRANSPORTATION, OFFICE OF RIGHT OF WAY,	:	
Respondent.	:	

Conference Room, Third Floor
Lucas State Office Building
Des Moines, Iowa
Thursday, December 14, 2000

The above-entitled matter came on for hearing at 9:00 a.m.

BEFORE: JOHN M. PRIESTER, Administrative Law Judge

* * *

[12] Another part of the case is that these signs are actually there because of a booster club, and the booster club takes the revenue from [13] hanging the signs on the fences to buy uniforms and so forth, and we think that that's protected as commercial speech under both the Federal and the Iowa constitutions, and I realize that there's case authority that says that you as an ALJ may not be able to make rulings on that, but we want to make

a record so that in case we have to later on, we haven't waived any of the rights of the appellants with respect to the commercial speech issues under both state law and under federal law.

And we also in that respect don't believe that there is going to be any evidence from the DOT of any empirical testing to demonstrate a relationship between these 4 by 8 signs that are over 300 feet from the right-of-way and driver distractions, or driver's information processing ability. We don't think they have any evidence to show any aesthetic impact upon the roadside environment, upon any highway traveler, or upon the adjacent property users.

We think the evidence will show that they have not taken into account anything about this community, and if they are trying to promote any sort of aesthetic interest, they have totally done nothing to evaluate whether or not the signs have [14] any impact aesthetically on the community of Gilbertville, Iowa.

* * *

Supreme Court, U.S.
FILED
APR 9 2003
CLERK

No. 02-1449

In The
Supreme Court of the United States

IMMACULATE CONCEPTION CORP.,
and DON BOSCO HIGH SCHOOL,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. MILLER
Attorney General of Iowa
GORDON E. ALLEN*
Deputy Attorney General
MARK HUNACEK
Assistant Attorney General
**Counsel of Record*
IOWA DEPARTMENT OF TRANSPORTATION
General Counsel Division
800 Lincoln Way
Ames, Iowa 50010
PH 515/239-1541
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should not this Court deny certiorari where: (1) this Court has already approved the constitutionality of a total ban on offsite commercial billboards, (2) this Court has, in the context of billboard regulation, deferred to legislative judgments concerning esthetics and safety, and (3) petitioners' own testimony establishes a basis for the statute?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
PETITIONERS' ARGUMENT THAT THE STATE IS REQUIRED TO PRODUCE STUDIES, STATISTICS OR EXPERT TESTIMONY REGARDING THE EFFICACY OF THE ADVERTISING PROHIBITION STATUTE, HAS ALREADY BEEN REJECTED BY THIS COURT AND OTHER COURTS. IN ANY EVENT, EVEN IF SUCH A REQUIREMENT EXISTED, SUCH EVIDENCE WAS PRODUCED BY PETITIONERS' OWN WITNESS	2
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Ackerley Communications of Northwest v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) 2, 4

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) 4

Lavey v. Two Rivers, 171 F.3d 1110 (7th Cir. 1999) 5

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) 2, 3, 4

Outdoor Systems, Inc. v. City of Lenexa, Kansas, 67 F. Supp. 2d 1231 (D. Kan. 1999) 4

United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) 4

SUMMARY OF ARGUMENT

Petitioners' argument that the state of Iowa was somehow required to produce studies or expert testimony justifying the statutory prohibition against advertising signs visible from a primary highway, Iowa Code § 306C.11, and did not do so, misreads the record and is wrong on the law. The prior opinions of this Court, and lower courts, demonstrate that a State does not need to produce studies or expert testimony regarding the efficacy of a billboard prohibition statute; any showing that the State must make can be done with common sense or legal precedent. Moreover, *petitioners' own witness* "helped explain why state law prohibits [the signs]" (App. 3-4): asked whether the signs could be read, this witness answered that it depended on "how fast you were going and if you want to have an accident or not by looking at the signs instead of at the road."

STATEMENT OF THE CASE

Don Bosco High School has baseball and softball diamonds located on school property in the city limits of Gilbertville, Iowa. Thirty-seven "booster signs" of local businesses who have contributed money to sponsor the ball teams are attached to the outfield fences of these ball fields, and are visible from a primary highway. Since these signs run afoul of Iowa Code § 306C.11, a statute which, with exceptions not relevant here, prohibits advertising that is visible from a primary highway, the DOT required their removal. After administrative proceedings resulted in affirmance of the removal order (App. 23, 24-31), petitioners sought judicial review.

The district court found three separate constitutional impediments to Iowa Code § 306C.11, two of which were not ever raised by petitioner. After summary affirmance by the Iowa Court of Appeals, the Iowa Supreme Court reversed the district court, pointing out that that court erred by considering constitutional issues not raised, and erred as well on the First Amendment issues.

REASONS FOR DENYING THE WRIT

PETITIONERS' ARGUMENT THAT THE STATE IS REQUIRED TO PRODUCE STUDIES, STATISTICS OR EXPERT TESTIMONY REGARDING THE EFFICACY OF THE ADVERTISING PROHIBITION STATUTE, HAS ALREADY BEEN REJECTED BY THIS COURT AND OTHER COURTS. IN ANY EVENT, EVEN IF SUCH A REQUIREMENT EXISTED, SUCH EVIDENCE WAS PRODUCED BY PETITIONERS' OWN WITNESS.

This case is controlled by *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), a case which, inexplicably, is neither cited nor discussed in the Petition for Writ of Certiorari. In *Metromedia*, "seven Justices agreed that San Diego's legislative judgment that billboards contribute to traffic hazards and visual blight sufficed to justify a complete ban on off site commercial billboards. *See Metromedia*, 453 U.S. at 510, 101 S.Ct. at 2893-94 (plurality); *id.* at 549-53, 101 S.Ct. at 2913-16 (Stevens, J., dissenting in part); *id.* at 560-61, 101 S.Ct. at 2919-20 (Burger, C.J., dissenting); *id.* at 570, 101 S.Ct. at 2924-25 (Rehnquist, J., dissenting)." *Ackerley Communications of Northwest v. Krochalis*, 108 F.3d 1095, 1099 n. 5 (9th Cir. 1997).

The *Metromedia* opinion makes clear that a state does not need statistics to show that advertising devices may be considered a safety hazard. After noting that other courts have reached this conclusion, this Court stated:

> We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context: "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

Id. at 509, 101 S.Ct. at 2893 (footnote omitted). A similar conclusion holds with respect to esthetic interests:

> It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as "esthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Id. at 510, 101 S.Ct. at 2893-94 (footnotes omitted).

Relying on *Metromedia*, lower courts have specifically rejected the argument that the government must make some sort of evidentiary showing regarding the efficacy of a billboard control statute or ordinance. In *Ackerley Communications*, for example, an outdoor advertising business sought to invalidate a regulation limiting the construction and relocation of billboards "because Seattle made no factual showing that the ordinance advances its goals to a material degree." *Id.* at 1097. Rejecting this argument, the court held that: "As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interest." *Id.* at 1099-1100. Likewise, in *Outdoor Systems, Inc. v. City of Lenexa, Kansas*, 67 F. Supp. 2d 1231 (D. Kan. 1999), the court reached the same conclusion, specifically pointing out that plaintiff's reliance on *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the same case relied on by petitioners here, was misplaced. The court pointed out that "in *Edenfield*, however, the Supreme Court did not alter the *Central Hudson* test. . . . Although the government is required to make the above showings, it may do so with common sense and/or legal precedent." *Id.* at 1238-39.

Petitioners' argument seems to be that these particular 37 signs do not pose a threat to traffic safety or esthetics. This Court, however, held in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), that this kind of individualistic "as applied" analysis was erroneous, because "it is readily apparent that this question [whether the regulation directly advances the governmental interest] cannot be

answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to the single person or entity." 509 U.S. at 427. Instead, the "validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Id.* at 430. *See also Lavey v. Two Rivers*, 171 F.3d 1110, 1115 n. 18 (7th Cir. 1999).

Even if some sort of particularized evidentiary showing *was* required, that showing has been made in the present case as a result of the "revealing testimony" (App. at 3) of petitioners' own witness, who, asked whether a sign could be read, stated that it depended on "[h]ow fast you were going and if you want to have an accident or not by looking at the signs instead of at the road." App. at 3-4. Thus, even petitioners' own witness recognized the common-sense view that distracting signs can reasonably be viewed as a threat to traffic safety.

CONCLUSION

It would be inappropriate to grant certiorari on an issue that has already been resolved adversely to petitioners by this Court, and by other lower courts. The decision of the Iowa Supreme Court is unquestionably correct and should not be disturbed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa
GORDON E. ALLEN*
Deputy Attorney General
MARK HUNACEK
Assistant Attorney General
**Counsel of Record*
IOWA DEPARTMENT OF
TRANSPORTATION
General Counsel Division
800 Lincoln Way
Ames, IA 50010
PH 515/239-1541 FAX 515/239-1609

No. 02-1449

Supreme Court, U.S.
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In The

Supreme Court of the United States

IMMACULATE CONCEPTION CORP., and
DON BOSCO HIGH SCHOOL,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITIONERS' REPLY BRIEF

JOHN WENDELL HOLMES*
HOLMES & HOLMES
531 Commercial Street
Waterloo, Iowa 50701
(319) 234-7506

Attorney for Petitioners
** Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

TABLE OF CONTENTS

		Page
I.	The State of Iowa has the burden to show the reality of the asserted harm	2
II.	The State of Iowa has the burden to show that 306C.11 in fact advances highway traffic safety and environmental esthetics	4
III.	The State of Iowa has the burden to show that 306C.11 is narrowly tailored and does not unreasonably restrict free speech	7
IV.	Finding that 306C.11 is presumed to be constitutional in a commercial speech case is incompatible with *Central Hudson*	8

TABLE OF AUTHORITIES

Page

CASES

Ackerley Communications v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) 1

Allison v. Bankers Life Co., 230 Iowa 995, 299 N.W. 889 (1941) 8

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1979) 7, 8, 9

Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 1, 2

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 1

Edenfield v. Fane, 507 U.S. 761 (1993) 4

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 3

Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999) 6, 7, 8

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) ..... *passim*

Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 8

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 6

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 4

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 2, 3, 6

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 6

OTHER

9 J. Wigmore, *Evidence*, § 2491 (3rd Ed. 1940) 8

PETITIONERS' REPLY BRIEF

Respondent's Brief in Opposition claims that the lack of any factual record to support enforcing Chapter 306C.11 of the Code of Iowa in this case is "controlled" by *Metromedia Inc. v. San Diego*, 453 U.S. 490 (1981). Respondent's view is found in *Ackerley Communications v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997). There the Court said:

> "Where a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls,' leaving to the Supreme Court 'the prerogative of overruling its own decisions.'"

Ackerley Communications v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997).

Unlike *Metromedia,* Chapter 306C.11 of the Code of Iowa does not "clearly cabin commercial speech in a distinct category." *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). The Iowa statute bans all visible signs within six-hundred-sixty feet of the right-of-way of any interstate, freeway or primary highway. Then it excepts: (1) all signs in areas that are industrial or commercial; and (2) signs "concerning activities conducted on the property on which [the signs] are located."

Thus Chapter 306C.11 would allow a sign in the front yard of your home on Highway 297 (the highway in this case) if you had a beauty shop in your garage; but it would ban a sign in your yard that said simply "For Peace in the Gulf." *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). It is

submitted this approach achieves a selective and categorical ban that is based on content. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415, 420 (1993).

Petitioners submit that since *Metromedia*, the decisions of this Court have consistently held that the government does have the burden to justify any restrictions on protected speech.

I. The State of Iowa has the burden to show the reality of the asserted harm.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) an attorney practicing in Ohio ran an advertisement that featured a line drawing of a Dalkon Shield. The illustrated ad asked the question "Did you use this IUD?" The attorney received over 200 inquiries and filed over 100 plaintiffs' lawsuits as a result of the ad. Ohio's Disciplinary Counsel filed a complaint against him for violating a Disciplinary Rule which prohibited the use of any illustrations. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 632 (1985). The Grievances Board found that the ad violated the disciplinary rule over the attorney's First Amendment objections. The Ohio Supreme Court adopted the Board's findings and issued a public reprimand. The attorney appealed to this Court, which said:

> "Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions *impose on the State* the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. . . . Because the illustration for which

> appellant was disciplined is an accurate representation of the Dalkon Shield . . . *the burden is on the State* to present a substantial governmental interest justifying the restriction . . . *and to demonstrate* that the restriction vindicates that interest . . ." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641, 647 (1985). (Emphasis added.).

The State argued the use of illustrations in advertising by attorneys creates unacceptable risks that the public will be misled. This Court, however, said:

> "We are not convinced. The State's arguments amount to little more than unsupported assertions: *nowhere does the State cite any evidence or authority of any kind* for its contention that the potential abuses associated with the use of illustrations in attorney's advertising cannot be combated by any means short of a blanket ban. Moreover, *none of the State's arguments establish that there are particular evils* associated with the use of illustrations in attorney's advertisements. . . . *We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task* in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648-649 (1985). (Emphasis added.).

Ten years after *Zauderer* was decided, the state of Florida was required to show that its restriction on targeted direct-mail by attorneys (in the thirty days following an accident or disaster) was aimed at a realistic harm. It did this with a study by the Bar Association. *Florida Bar*

v. Went For It, Inc., 515 U.S. 618, 626 (1995). The majority characterized the study as sufficient to meet the standard elaborated in *Edenfield v. Fane*, 507 U.S. 761 (1993). *Id.* at 628. Fifteen years after *Zauderer*, the United States was required to show that there was a nationwide, pervasive problem of signal bleed to justify a nationwide daytime ban on adult programming. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). The government's study was not sufficient. The opinion concludes:

> ". . . but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive nationwide problem justifying its nationwide daytime speech ban."

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 822-823 (2000).

In all three of these cases, all decided after *Metromedia*, the government, not the citizen, had the burden to show the reality of the asserted harm.

II. The State of Iowa has the burden to show that 306C.11 in fact advances highway traffic safety and environmental esthetics.

The Brief in Opposition claims that requiring the government "to produce studies, statistics or expert testimony regarding the efficacy of the advertising prohibition statute has already been rejected by this Court," again citing *Metromedia Inc. v. San Diego.*

Since the plurality in *Metromedia* found that the way the city ordinance elevated commercial speech over non-commercial speech was fatal, it did not have to reach the problem that the City of San Diego did not produce any evidence showing signs are a hazard to traffic safety. Justice White's opinion says:

> "We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, *e.g.* onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. . . . If the city has concluded that its official interests are not as strong as private interests in commercial communications, may it nevertheless claim that those same official interests outweigh private interests in non-commercial communications? Our answer . . . is in the negative."

Metromedia Inc. v. San Diego, 453 U.S. 490, 520-521 (1981).

Justice Brennan, joined by Justice Blackmun, concurring in the judgment, said:

> ". . . although I have no quarrel with the substantiality of the city's interest in traffic safety, the city has failed to come forward with evidence demonstrating that billboards actually impair traffic safety in San Diego. Indeed, the joint stipulation of facts is completely silent on this issue. Although the plurality hesitates 'to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety,' . . . I would not be so

> quick to accept legal conclusions in other cases as an adequate substitute for evidence *in this case* that banning billboards directly furthers traffic safety."

Metromedia Inc. v. San Diego, 453 U.S. 490, 528 (1981).

At this point in his opinion, Justice Brennan footnoted that the eleven cases cited by the plurality for the proposition that reviewing courts have determined that billboards are a real and substantial hazard applied "the minimal scrutiny rational relationship test *and the presumption of legislative validity*" to hold that it would not be unreasonable for a legislature to conclude that billboards are traffic hazards. *Id.* at note 7. (Emphasis added). Of course, this is overlooked in *Ackerley*. Justice Brennan had a valid point: the eleven cases themselves don't have factual records to support that billboards are a real hazard to traffic.

About ten years after *Zauderer* was decided, the United States was required to show that its restriction on showing the alcohol content on a beer bottle label advanced the government's interest in avoiding "strength wars." The government submitted "anecdotal evidence and educated guesses" which could not overcome that the regulations were irrational. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). The next year Rhode Island was required to show its ban on price advertising significantly reduced alcohol consumption. It failed to carry "its heavy burden." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 516 (1996). Later, the United States failed to connect casino gambling and compulsive gambling with broadcast advertising for casinos – let alone private commercial casinos. *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 189 (1999).

In all three of these cases, all decided after *Metromedia*, the government, not the citizen, had the burden to show the means chosen sufficiently related to the ends served.

III. The State of Iowa has the burden to show that 306C.11 is narrowly tailored and does not unreasonably restrict the public's free speech.

In *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), this Court held that an FCC regulation implementing the Communications Act of 1934 (which prohibited broadcasters in Louisiana from carrying advertising about private casinos) violated the First Amendment under the third and fourth parts of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. 447 U.S. 557 (1979). The Court said:

> "In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. [citations omitted]. The four parts of the *Central Hudson* test are not discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. . . .
>
> "The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – 'a

> fit that is not necessarily perfect, but reasonable; . . . [citations omitted]."

Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173, 183-184, 188 (1999).

The Brief in Opposition claims this showing can be made with common sense and/or legal precedent. (Brief in Opposition, p. 4). Cases from Seattle, Washington, and Lenexa, Kansas are cited. Demonstrating narrow tailoring and reasonable fit by extrapolation of evidence from other cases is unprecedented. *Cf. Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989).

No case from this Court has been cited in the Brief in Opposition in which a majority holds that the government's burden under *Central Hudson* can be shifted to the private citizen whose speech is being restricted. Justices Brennan and Blackmun only concurred in the judgment in *Metromedia*.

IV. Finding that 306C.11 is presumed to be constitutional in a commercial speech case is incompatible with *Central Hudson*.

It cannot be held that the government has the burden to show the harm is real, that the means are effective and that there is a "reasonable fit" while at the same time it is held that the state statute is to be presumed constitutional. This is because a legal presumption puts the burden on the private citizen to produce evidence to the contrary sufficient to satisfy the judge's requirement of some evidence. *See Allison v. Bankers Life Co.*, 230 Iowa 995, 999, 299 N.W. 889 (1941); 9 J. Wigmore, *Evidence*, § 2491 (3rd Ed. 1940). It is submitted that no commercial speech case of this Court has gone so far. The state-law

presumption of constitutionality and the third and fourth part of the *Central Hudson* test are incompatible. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564-565 (1979).

It is submitted that allowing the government to rely on a legal presumption instead of making a factual record fails to satisfy the standard of proof under *Central Hudson*. The Petition for Certiorari should be granted.

Respectfully submitted,

JOHN WENDELL HOLMES*
HOLMES & HOLMES
531 Commercial Street
Waterloo, Iowa 50701

Attorney for Petitioners
**Counsel of Record*